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PUC DOCKET NO. 52300

FORMAL COMPLAINT OF TUESDAY MORNING INC. AGAINST MIDAMERICAN ENERGY SERVICES LLC	§ § § §	BEFORE THE PUBLIC UTILITY COMMISSION OF TEXAS
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**FORMAL COMPLAINT OF TUESDAY MORNING INC. AGAINST MIDAMERICAN
ENERGY SERVICES LLC AND REQUEST TO WAIVE INFORMAL COMPLAINT
RESOLUTION FOR GOOD CAUSE**

TO THE HONORABLE COMMISSIONERS:

COMES NOW, Tuesday Morning Inc. ("Tuesday Morning," or "Complainant") and files this formal Complaint against MidAmerican Energy Services LLC ("MidAmerican") pursuant to PUC Procedural Rule 22.242(e), and would respectfully show as follows:

INTRODUCTION

Tuesday Morning is a retail store operator with over seventy-five locations in Texas. Tuesday Morning is supplied electricity for its facilities in Texas within the competitive areas of the grid operated by the Electric Reliability Council of Texas ("ERCOT") by MidAmerican pursuant to a Retail Electric Supplier Agreement ("Supply Agreement" or "the Contract") entered into in June 2019. A complete copy of the Contract is attached to this Complaint as Confidential Attachment No. 1. The Contract provides that Tuesday Morning will purchase electricity from MidAmerican entirely on a **Fixed Price** for the term of the Contract from June 2019 to June 2022. Alternatives for the application of variable prices or different prices for peak and off-peak times of usage are provided for by the Contract but were not selected by Tuesday

Morning. The entirety of Tuesday Morning's electricity supply from MidAmerican is to be on a Fixed Price basis for the duration of the contract.

The terms of the Contract expressly state that "all charges assessed by ERCOT and Ancillary charges" are **included in the Fixed Price**. Confidential Attachment No. 1 at Schedule B, Page 1.

Consistent with the terms of the Contract, Tuesday Morning received invoices from MidAmerican from June 2019 to January 2021 that were calculated based on energy usage at a fixed price basis and with only those additional charges assessed as allowed by the Contract. Ancillary charges were, in accordance to the Contract, incorporated into the fixed price calculation.

For February 2021, however, MidAmerican invoiced each of Tuesday Morning's facility accounts a "Supplemental Ancillary Charge" that, it stated, "reflects ancillary costs assessed by the Electric Reliability Council of Texas (ERCOT) for reliability functions performed during the February winter storm event." An example of these invoices is attached to this Complaint as Confidential Attachment No. 2. These "Supplemental Ancillary" charges amount to many thousands of dollars per facility account for February 2021 and amount to more than \$200,000 to Tuesday Morning in the aggregate. A spreadsheet showing the calculation of the "Supplemental Ancillary" charges to each of Tuesday Morning's facilities is attached to this Complaint as Confidential Attachment No. 3.

Tuesday Morning attempted to resolve this dispute by communication with MidAmerican but was unsuccessful. MidAmerican continues to attempt to collect from Tuesday Morning ancillary charges that are included by the terms of the Contract in the Fixed Price.

TEX. ADMIN. CODE CHAPTER 16 SEC. 22.242(E) REQUIREMENTS

Complainant is Tuesday Morning Inc.¹ Complainant's representative is the undersigned counsel and their contact information is as follows:²

Andres Medrano
Foley & Lardner LLP
600 Congress Ave, Ste. 3000
Austin, Texas 78701
Tel: (512) 542-7013
Fax: (512) 542-7213
Email: amedrano2@foley.com

Complainant files this complaint against MidAmerican Energy Services, LLC.³ Complainant is not seeking relief relating to service by a utility received within the limits of a city.⁴ Complainant attempted informal resolution directly with MidAmerican.⁵ Complainant seeks waiver of the requirement for informal complaint resolution at the Commission for good cause.⁶ A detailed statement of facts is provided below and relevant documentation is attached hereto.⁷

Complainant is seeking an order from the PUC requiring MidAmerican to cease and desist attempting to collect charges for Ancillary Services which it provided to Complainant as part of a Fixed Price contract. Complainant further seeks determination from the PUC that the Ancillary Service charges for February 2021 were included in the Fixed Price of the Contract between Tuesday Morning and MidAmerican.

¹ See 16 TAC § 22.242(e)(2)(A).

² See 16 TAC § 22.242(e)(2)(B)-(C).

³ See 16 TAC § 22.242(e)(2)(D).

⁴ See 16 TAC § 22.242(e)(2)(E)-(F).

⁵ See 16 TAC § 22.242(e)(2)(G).

⁶ See 16 TAC § 22.242(e)(2).

⁷ See 16 TAC § 22.242(e)(2)(H).

REQUEST TO WAIVE INFORMAL COMPLAINT REQUIREMENT FOR GOOD

CAUSE

Tuesday Morning requests that the requirement for informal resolution of this complaint pursuant to 16 TAC § 22.252(c) be waived for good cause as follows. Tuesday Morning is a large commercial customer of electricity services with an aggregate demand of its facilities greater than fifty (50) kW. The Contract between Tuesday Morning and MidAmerican applies materially different customer protections than those in the Consumer Protection Rules (Subchapter R) of this Commission. Accordingly, there is no relief pursuant to the Consumer Protection Rules that could be provided to Tuesday Morning by an informal complaint.

Further, Tuesday Morning has already attempted to resolve this matter informally by disputing the charges with MidAmerican directly. MidAmerican refused to provide any resolution to the dispute in its initial response to Tuesday Morning's dispute. A copy of MidAmerican's response is attached to this Complaint as Attachment 5. Tuesday Morning then elevated the dispute directly with MidAmerican but received a substantively identical response. A copy of MidAmerican's second response is attached to this Complaint as Attachment 6.

Tuesday Morning has made every effort to resolve this dispute outside of the formal complaint process. No relief is available pursuant to Tuesday Morning on an informal basis as it is a commercial customer with an aggregate demand of more than 50 kW. For these reasons, Tuesday Morning requests that the requirement for informal resolution of 16 TAC § 22.252(c) be waived for good cause.

STATEMENT OF FACTS

1. **The Contract Provides that Ancillary Service Charges are Included in a Fixed Price**

The Contract between Tuesday Morning and MidAmerican sets forth the terms and conditions of the provision of electricity to Tuesday Morning's facilities in the competitive areas of the ERCOT market. The Contract and its Schedules constitute the entire agreement between Tuesday Morning and MidAmerican and was executed in June 2019 by both parties with full disclaimer provisions. Tuesday Morning and MidAmerican are both sophisticated commercial entities with access to the counsel and expertise necessary to fully understand and engage in the Contract.

The pricing terms for electricity provided by MidAmerican to Tuesday Morning are set forth as follows:

FIXED PRICE. If Customer does not elect an On-Peak/Off-Peak Fixed Price, the Fixed Price will be applied to all usage within the respective Pricing Period and is inclusive of congestion (including local, inter-zonal, and HUB to zone congestion charges).

VARIABLE PRICE. The Variable Price per kWh for Interval Energy Usage shall be the associated interval Day Ahead Settlement Point Prices (SPP) for the Load Zone applicable to the ESI Bids listed on Schedule A (in \$/kWh) and is inclusive of congestion (including local, inter-zonal, and HUB to zone congestion charges).

Pricing Period	On-Peak/Off-Peak Fixed Price (\$/kWh)		Fixed Price (\$/kWh)
	On-Peak	Off-Peak	
Jun 2019 - Jun 2022	N/A	N/A	

The entirety of the electricity to be supplied to Tuesday Morning pursuant to the Contract is on a Fixed Price basis with no electricity supplied at a Variable Price and no difference in price for on-peak or off-peak intervals.

The terms of the Contract plainly state that Ancillary Service charges are included in the Fixed Price as follows:

The Fixed Price and/or the Variable Price Adder includes costs associated with line loss based on applicable transmission and delivery tariff loss factors, renewable compliance costs, all charges assessed by ERCOT and Ancillary charges. Renewable compliance charges include, but are not limited to costs associated with renewable portfolio standards or all other environmental and renewable program compliance costs required by the Delivery Company, ERCOT, state or federal regulatory agencies. The term "Ancillary" means wholesale electric services, capacity, Regulation Up Service Charges, Regulation Down Service Charges, Responsive Reserve Service Charges, Non-Spinning Reserve Service Charges, Reliability Unit Commitment Charges and other costs required to facilitate delivery of electricity to Customer's Delivery Points.

To date, MidAmerican has not disputed that the Ancillary Services for which it seeks to invoice Tuesday Morning were other than those specifically defined by the Contract as stated above.

2. MidAmerican is Attempting to Invoice Tuesday Morning for "Supplemental Ancillary Service Charges in Violation of the Contract"

On or about April 22, 2021, MidAmerican began to send invoices to the accounts of Tuesday Morning's facilities for "Supplemental Ancillary Services" for the week of February 14-21, 2021. An example of these invoices is attached to this Complaint as Confidential Attachment No. 2. These invoices itemize charges for Ancillary Services at unit prices for February 14-21, 2021. On the example invoice, the prices range from approximately nine cents per kWh to over 2 dollars per kWh. Only ancillary services for the days of February 14-21 are invoiced. On all other invoices received by Tuesday Morning from MidAmerican prior and subsequent to February 2021, Ancillary Services are not itemized and no charges are assessed for those charges. An example of a standard invoice received from MidAmerican is attached to this Complaint as Confidential Attachment No. 4.

The invoiced amounts for "Supplemental Ancillary Service Charges" are thousands of dollars for each of Tuesday Morning's facilities and over \$200,000 in aggregate. A spreadsheet

showing the total invoices for these “Supplemental Ancillary Service Charges” from MidAmerican is attached to this Complaint as Confidential Attachment No. 3.

MidAmerican invoiced Tuesday Morning for these “Supplemental Ancillary Service Charges” without notice or explanation. No contractual provision is identified allowing the invoice of the charges and no “Force Majeure” or “Change in Law” provision of the Contract is claimed on the invoices to Tuesday Morning or any other communications.⁸

3. **No Changes to “Business Practice” or Business Protocols” Applicable to Ancillary Service Charges Occurred Respective to February 2021**

Tuesday Morning disputed the “Supplemental Ancillary Service Charges” invoiced by MidAmerican in accordance with the terms of the Contract. MidAmerican responded in an undated letter attached to this Complaint as Attachment No. 5. The core of MidAmerican’s response to the dispute was as follows:

Schedule B to the Retail Electric Supplier Agreement allows MES to recover these costs. Schedule B contains the following clause:

Any future changes in the business practice or business protocols of the Delivery Company, RTO, or ISO; Ancillary charges or applicable Delivery charges or transmission tariffs that affect the items included in the applicable Fixed Price and/or Variable Price, as defined in this Schedule B, may be incorporated herein as a separate adjustment as of the effective date on which the change occurs or thereafter.

In accordance with the contract language, the change in ancillary charges affecting the items included in your Fixed Price and/or Variable Price contract are properly incorporated as a separate adjustment to your bill.

⁸ Tuesday Morning do not agree that either Force Majeure or Change in Law are applicable to the Ancillary Service Charges.

Tuesday Morning acknowledges that Schedule B to the Contract includes the cited language but disagrees that the language in any way justifies the invoices for “Supplementary Ancillary Service Charges.” The language states that Ancillary Service charges can be incorporated as an adjustment only in the event that there is a change in the “business practice or business protocols of the Delivery Company, RTO, or ISO.” The Delivery Company in this context would be the Transmission-Distribution Utility (“TDU”) providing service to Tuesday Morning’s facilities and there has been no change of practice or protocols by any TDU identified that would affect Ancillary Service charges. The “RTO” or “ISO” in this context is ERCOT. ERCOT did not change its business practice or protocols during the week of February 14-21, 2021, for which the “Supplemental Ancillary Service Charges” are invoiced.

ERCOT protocols are formally adopted pursuant to administrative procedures and no protocol revisions or modifications were implemented during February 14-21, 2021, that affected ancillary service charges. The protocols setting forth the methodology and algorithms for the calculation of ancillary service charges during that week were previously adopted and approved through the formal ERCOT stakeholder process.

ERCOT is an independent non-profit organization that operates pursuant to statute to manage the electricity grid and its associated systems. It is not at all apparent that the term “business practices” has any applicability to ERCOT. That term appears to apply solely to the TDUs that serve as the Delivery Company in this context. However, even if the term “business practices” could be applied to ERCOT there was no change to such practices in relation to the calculation of Ancillary Services for the week of February 14-21, 2021. The *inputs* to calculation were severely impacted by the extreme winter weather affecting the entirety of Texas during that week. These inputs were also impacted by the orders of the Commission directing

that scarcity prices be implemented during actual scarcity conditions *in accordance to existing law and regulations*. The calculation of the Ancillary Service charges for that week occurred exactly as specified in the existing ERCOT protocols.

The terms of the Contract cited by MidAmerican do not justify its invoices for “Supplemental Ancillary Service Charges” nor do they in any way affect the definition of **Fixed Rate** or the fact that the Contract expressly includes Ancillary Service charges within the definition of a Fixed Rate.

Upon receipt of MidAmerican’s initial response to the invoice dispute, Tuesday Morning elevated the dispute through counsel. On or about June 10, 2021, MidAmerican responded with a second undated letter attached to this Complaint as Attachment 6. MidAmerican provided no further justification for its invoice of “Supplemental Ancillary Service Charges” and merely stated that it considers the dispute action to be closed.

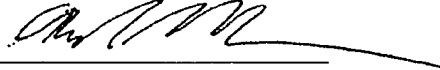
RELIEF SOUGHT

Tuesday Morning respectfully requests that the PUC order MidAmerican to comply with the terms and conditions of the Contract with Tuesday Morning and to cease and desist attempts to collect Ancillary Charges or “Supplemental Ancillary Charges” from Tuesday Morning which are included in the Fixed Price terms of that Contract. Tuesday Morning requests all other relief to which it is entitled.

Respectfully submitted,

Foley & Lardner LLP


600 Congress Avenue, Ste. 3000
Austin, Texas 78701

By: 

Andres Medrano
Texas State Bar No. 24005451
(512) 542-7013/542-7213
amedrano@gardere.com

CERTIFICATE OF SERVICE

This is to certify that on July 2, 2021, a true and correct copy of this document was served on the following parties by electronic mail and first class mail.


Andres Medrano

Confidential Attachment 1

Confidential Attachment 2

Confidential Attachment 3

Confidential Attachment 4

Attachment 5

MidAmerican Energy Services, LLC
4299 NW Urbandale Drive
Urbandale, IA 50322

Tuesday Morning, Inc.
Contract # 45686

Dear Tuesday Morning, Inc.:

MidAmerican Energy Services, LLC ("MES") has received your Notice of Dispute in which you dispute the ancillary charges on your bill. In good faith to resolve this dispute, MES' legal team has completed a review of your contract. It has been determined that the additional ancillary charges were correctly applied to your bill.

The supplemental ancillary charges reflect additional ancillary costs assessed by the Electric Reliability Council of Texas (ERCOT) for reliability functions performed during the February winter storm event.

Schedule B to the Retail Electric Supplier Agreement allows MES to recover these costs. Schedule B contains the following clause:

Any future changes in the business practice or business protocols of the Delivery Company, RTO, or ISO; Ancillary charges or applicable Delivery charges or transmission tariffs that affect the items included in the applicable Fixed Price and/or Variable Price, as defined in this Schedule B, may be incorporated herein as a separate adjustment as of the effective date on which the change occurs or thereafter.

In accordance with the contract language, the change in ancillary charges affecting the items included in your Fixed Price and/or Variable Price contract are properly incorporated as a separate adjustment to your bill.

The review of this matter is now complete. MES has concluded that the additional ancillary costs can be assessed under the terms of your Retail Electric Supplier Agreement. MES considers this dispute action closed, and payment is expected by the due date. All charges, disputed and undisputed, are expected to be paid by the due date and will be subject to late fees.

Sincerely,
MidAmerican Energy Services, LLC

Attachment 6



MidAmerican Energy Services, LLC
4299 NW Urbandale Drive
Urbandale, Iowa 50322

Tuesday Morning, Inc.
Contract # 45686

Dear Tuesday Morning, Inc.:

MidAmerican Energy Services, LLC ("MES") has received your reply to the Response to Notice of Dispute in which MES determined the additional ancillary charges were correctly applied to your bill. MES' legal team completed a review of your contract and the additional ancillary costs can be assessed under the terms of your Retail Electric Supplier Agreement.

MES continues to consider this matter complete and the dispute action closed. Payment in full is expected and all charges, disputed and undisputed, are expected by the due date and will be subject to late fees.

Sincerely,
MidAmerican Energy Services, LLC